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May 16, 2000

BY HAND

The Honorable Vernon A. Williams, Secretary
Surface Transportation Board
Office of the Secretary
Case Control Unit
Attn: STB Ex Parte No. 582 (Sub-No. 1)
1925 K Street, NW
Washington, DC 20423-0001

Re: STB Ex Parte No. 582 (Sub-No. 1),
"Major Rail Consolidation Procedures"

Dear Secretary Williams:

Enclosed for filing in the above-referenced matter are an original and 25 copies of the Comments of CSX Corporation and CSX Transportation, Inc., together with a WordPerfect diskette. A certificate of service accompanies the document.

Kindly date-stamp the extra copy of this letter and the Comments, which our messenger is presenting, and return them to the messenger.

If there are any questions concerning this matter, please call the undersigned at (202) 942-5858.

Sincerely yours,

Dennis G. Lyons
Counsel for CSX Corporation and CSX Transportation, Inc.

rjm
Enclosures
cc All Parties of Record

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BEFORE THE
SURFACE TRANSPORTATION BOARD

STB Ex Parte No. 582 (Sub-No. 1)

MAJOR RAIL CONSOLIDATION PROCEDURES

COMMENTS OF CSX CORPORATION AND CSX TRANSPORTATION, INC.

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May 16, 2000

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BEFORE THE
SURFACE TRANSPORTATION BOARD

STB Ex Parte No. 582 (Sub-No. 1)

MAJOR RAIL CONSOLIDATION PROCEDURES

COMMENTS OF CSX CORPORATION
AND CSX TRANSPORTATION, INC.

CSX Corporation and CSX Transportation, Inc. (collectively, "CSX") respectfully submit their comments to the Surface Transportation Board (the "Board") pursuant to the Board's Decision in the above matter, served March 31, 2000.

The Board's action in starting this proceeding was most appropriate. The Board recognized that times have changed in the railroad industry, particularly with respect to major rail combinations. Many prominent shippers believe there should be no rail combinations, at least in the foreseeable future; other parties continue to support combinations; and the Board was confronted with a proposal for the first transcontinental combination involving the United States at a time when it was clear to all that the Board's existing policies, rules and procedures needed a thorough rethinking and modernization.

The structure of the North American railroad industry will be defined for the foreseeable future by any further consolidation among the existing Class I rail carriers. Virtually every conceivable combination of Class I carriers will involve

a transcontinental transaction, that is, one which establishes, or augments, a transcontinental railroad; and some may involve transnational railroads.[1] The Board must play a critical role in ensuring that these transactions, if and when they occur, will create efficiencies benefiting shippers and, indeed, the entire economy of North America. The Board must satisfy itself and provide shippers the confidence that the short-term service disruptions that may arise from any future mergers are minimized, while significant long-term service improvements are maximized.[2]

CSX believes that, in due course, certain transcontinental mergers, properly designed, conditioned, and implemented, could promote the public interest – including the important interests of the railroad's freight customers. The extension of single-line service, which is universally viewed as advantageous to the shipping public, is the major benefit that may be expected from further combinations. In addition, transcontinental combinations may yield significant cost reductions to a combined enterprise. Accordingly, in order to best serve the public interest, the Board must balance all of the benefits and risks associated with each such proposal, and carefully review and monitor operational implementation so as to provide

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1 We suggest such a definition for "transcontinental transactions" for the Board's regulations in Appendix A.

2 The words "merger" or "combination" are used throughout in reference to any of the combinations set forth in 49 U.S.C. § 11323(a)(1) through (5).

shippers with the confidence that any future combination will maximize overall service enhancement.

CSX respectfully submits that the Board's review of major consolidation applications should be guided by the following:

- In terms of major rail combinations, the industry is now at the "endgame," and new rules are necessary. The world has changed from the time that rail combinations were only local, sectional or regional. The Board's rules, little changed from the late 1970's and last revised in 1982, are outmoded and must be fundamentally revised.
- The new rules must apply fully to every party proposing a major rail combination. Otherwise the Board will lose all control and be put in a situation where its hands are tied by a "gun-jumper."
- The Board should "raise the bar" in a number of respects discussed in these comments in its consideration of rail combinations.
- The Board should become even more proactive in combinations in the preauthorization stage, making greater in-depth examinations of areas closely related to service to shippers, including the integration process, the capital plans of the applicants, the capacity and capability of their proposed network, and "nuts-and-bolts" issues such as car supply.
- The Board must look more carefully at alternatives to full combinations, such as marketing alliances, line swaps, and other joint ventures and initiatives; must be willing to authorize them readily where they involve exercises of the Board's jurisdiction; and must examine the benefits of proposed combinations more critically in the light of whether the same benefits could be obtained as a practical matter without a full combination.

- Each Class I merger is likely to foreclose some potential transactions, while increasing the likelihood of others, thereby largely determining the final structure of the North American rail system. In analyzing any such merger proposal, therefore, the Board should consider the downstream effects of the combination. Substantially contemporaneous merger applications should be consolidated.

- Recent history indicates that service disruptions pose the greatest risk to the public interest arising from major rail consolidations. The Board should therefore ensure, through consultation and review of detailed integration plans, that mergers are implemented so as to minimize such disruptions. The Board should focus on ***preventing*** unnecessary service disruptions, and should provide mediation structures for smaller shippers to address service difficulties.

- The rail industry is capital-intensive, is presently lacking capacity, is in need of capital expansion, and generally is not revenue-adequate. Mergers must work toward making the industry members more efficient, increasing rail demand by improving service, and thus improving their capacity to raise capital.

- The Board's current policies have been very effective in maintaining and fostering competition without unduly restricting otherwise efficient combinations. Accordingly, the Board should continue to analyze the competitive effects of combinations by carefully applying the existing analytical framework, including the current analysis of "bottlenecks" and "one lump" situations, to the specific facts and circumstances of a proposed merger.

- In all transcontinental combinations the efficient major transcontinental gateways that existed prior to the transaction and which gave the originating and terminating carriers an adequately long haul should be preserved, but not on a basis that discourages price competition.

- The present rulemaking must focus on issues that are pertinent to the prospective rail combinations and must not be an occa-

sion for re-regulatory schemes that will have the effect of transferring revenues from the railroad industry to shippers.

- The Board should require any merger application involving either of the two major Canadian railroads – each of which is among the six largest North American carriers – to include specified information regarding cross-border issues.

- To avoid disrupting the reasonable expectations of parties to prior transactions or discouraging the future creation of shortlines, the Board should not, in connection with Class I mergers, disturb the terms of past transactions that created shortlines.

- Recognizing the contributions of labor to the successful implementation of Board-approved transactions, the Board should continue to promote discourse and cooperation between labor and management throughout the consolidation process. In addition, the Board should retain its *New York Dock* procedures regarding post-merger modifications to collective bargaining agreements so that carriers may consolidate the employees and operations of different railroads and realize the efficiencies arising from approved transactions. For the same reason, the Board should not disturb the already generous protections afforded employees who are adversely affected by mergers.

DISCUSSION

I. THE BOARD SHOULD CONSIDER THE DOWNSTREAM EFFECTS OF MAJOR RAIL MERGERS

The downstream, follow-on effects of any major rail merger on other possible combinations is an appropriate subject for Board examination. The Board should implement rules for procedural and substantive consolidation of applications requiring that any reasonably contemporaneous applications be considered together. Such consideration would be without prejudice to the later filing, so that

approval of each merger will depend on the merits of the transaction from a public interest perspective – not on the outcome of a "race to the courthouse."

The Board has recently waived the provision in its General Policy Statement prohibiting consideration of "downstream" consequences of combinations. That prohibition, which is sometimes called the "one merger at a time" rule, was instituted in reaction to delays caused by the seemingly unending responsive proposals in the ICC proceeding arising from the Rock Island railroad bankruptcy and liquidation. The rule is no longer required, in light of the Board's demonstrated ability to manage its proceedings and to complete them within the timeframes specified in 49 U.S.C.§ 11325. Moreover, the degree of consolidation that has already occurred in the industry has limited the number of major "downstream" combinations that would have to be considered. Accordingly, the "one merger at a time rule" should be abolished permanently in the context of transcontinental mergers.

The proposal of any transcontinental merger is likely to cause other major Class I railroad carriers to investigate combinations. The number of possible combinations, however, is limited. For example, if the CN/BNSF proposal went forward, that merger would affect the complexion of any proposed transcontinental merger among the remaining five large North American rail carriers. If one of the two large Eastern carriers were added to a CN/BNSF combination, the drawing of the railroad map would be virtually complete.

Accordingly, it is appropriate that, in evaluating any Class I combination, the Board consider the impact of the combination on other proposed mergers, and the effect of the various transactions as a whole. The public interest may require the Board to condition its approvals on contingencies with respect to other proposed transactions.[3] The current structure and competitive dynamics of the industry strongly suggest the triggering effect of a major Class I merger and justify consolidated review of transactions occurring within a reasonable time sequence and other actions by the Board to take a view of the whole picture in cases where such follow-up transactions are likely.

Evidentiary requirements should be prescribed by the Board to give content to the new requirement to deal with downstream effects. We suggest, in Appendix G, an appropriate implementation.

II. THE BOARD SHOULD ENDEAVOR, THROUGH CONSULTATION AND REVIEW OF DETAILED INTEGRATION PLANS, THAT MERGERS BE IMPLEMENTED WITHOUT UNNECESSARY SERVICE DISRUPTIONS

Efficiencies produced by mergers inure directly to the benefit of shippers by creating new service options and by reducing transportation times and carrier costs, thus making them more competitive with other shipper options. Unfortunately, as

[3] Provisions for future line transfers, for example, may be conditioned on the consummation of particular transcontinental combinations. *See* in the Conrail Case, Finance Docket No. 33388, CSX/NS-25, Vol. 8B, at 109.

demonstrated by several recent major combinations, including BN/SF, UP/SP and CSX/NS/Conrail, larger and more complex mergers carry an increased risk of temporary service disruptions. To the extent they are avoidable, these disruptions result in unnecessary harm to shippers. Minimizing such disruptions – and assuring shippers that service will continue without unnecessary interruption – is an appropriate focus of the Board's review of merger proposals.

Some of the proactive, consultative techniques that the Board has used successfully in reviewing the impacts of prior proposed transactions can be applied to minimize service disruptions associated with future rail mergers – and to reassure shippers that an approved merger ultimately will result in service enhancement. For example, the Conrail Transaction Council, a condition imposed by the Board in the Conrail transaction, facilitated effective consultation and interaction. The Board's examination of environmental impacts of transactions also has been proactive, with consultants (retained at the expense of the applicants) assisting a select staff of the Board in communicating with affected members of the public, raising issues, and finding solutions. Similarly, safety issues in the Conrail Transaction were the subject of formal "Safety Integration Plans," which were closely examined by the Board and by the Federal Railroad Administration. The excellent safety record of the Conrail division demonstrates the value of this approach; no death or serious injury has been associated with the Conrail integration.

The Board should consider requiring that every major merger applicant file detailed Integration Plans and plans for fixed facility and rolling stock capacity. As discussed in greater detail below, these plans would address, *inter alia*, the integration process, the capital plans of the applicants, the capacity and capability of their proposed network, and "nuts-and-bolts" issues such as car supply. A section of the Board's staff specializing in operational matters, with the assistance of consultants, would examine the plans in an interactive process with the applicants. The plans also would be subject to comments and counter-evidence by participants in the case, in accordance with the Board's ordinary procedures in merger cases. CSX believes that this review and consultation, described below in greater detail, will assist in preventing unnecessary service interruptions.

A. Applicants Should Be Required To File Detailed Integration Plans

CSX proposes that applicants be required to file Integration Plans describing how every function of the combining systems will be integrated, identifying potential service disruptions, and articulating how they will be minimized. Issues relating to access, to competition, to requests for trackage rights, and to other issues concerning the rail map and economic issues arising directly from the transaction can be adequately handled in a trial-type formal process. Important "nuts-and-bolts" issues of how a combination is to be put together so that it works, how a capital plan interacts with an operating plan, or how a car supply plan will work,

are not as susceptible to constructive ventilation in a formal-trial-type process. The Integration Plans will be subjected not only to public comment, but also to careful review by a section of the Board's staff – assisted by consultants hired at the applicants' expense – and extensive consultation between the Board and the applicants. This review and consultation would continue post-approval in the monitoring process through full implementation of the transaction.

The Integration Plan should include at least the following:

- A statement as to whether the integration of the two systems is to be effected in one step or in several phases. For example, the Conrail implementation was necessarily effected on a single "Split Date," during which Conrail was divided into two parts for separate operation by two competing railroad carriers, and three "Shared Assets Areas" were inaugurated. Other transactions may call for phased implementation.

- A description of the activities that will characterize each phase of the integration – *e.g.*, the integration of particular functions or routes, the rerouting of particular commodity movements, specific capital improvements, *etc.*

- Objective measurements – to be a subject of weekly reporting in the post-Effective Date operational oversight – that the applicants will use to determine when they are ready to effect each successive phase of the implementation.

- A schedule reflecting target dates for each phase of the integration and a critical path analysis identifying each preliminary step that must be taken prior to each phase and the interdependencies between the steps in the critical path.

- A list of the potential "choke points" in applicants' systems during the integration and a description of objective measurements – to be included in post-Effective Date operational monitoring – that would signal potential problems at the choke points.

- Contingency plans that applicants propose to deploy if congestion or other difficulties occur at the choke points, the triggers for the deployment of the contingency plans, and the effects of such deployment on their network and the networks of other rail carriers.

- A plan for integrating the applicants' information systems, identifying the major systems to be integrated, assessing the extent to which those systems are compatible, and describing any interim measures for managing information prior to full integration.

- A discussion of any transfers, hires, reductions or other changes to be made with respect to the applicants' labor forces and the phases of the integration during which these changes will occur.

The Integration Plan should address all of the operational changes described in the Operating Plan required by 49 C.F.R. § 1180.8(a), describing how those changes will be effected during the integration. The Plan should in this regard update the Operating Plan to the extent that it may be out of date (based on, as it is, the relatively old impact year). The Integration Plan should also be coordinated and consistent with the Capacity Plans for fixed facilities and rolling stock and the Rolling Stock Supply Plan discussed below.

The Integration Plan and its interactive examination by and consultation with the Board's staff and consultants should complement, rather than substitute for, the post-authorization monitoring of the transaction. The objective measurements described in the Integration Plan, among other things, should be included in the monitoring conditions. Nor would the Integration Plan replace the Safety Integration Plan, an important new feature that the Board has introduced into its

review of consolidation applications. The Integration Plan should be coordinated with the Safety Integration Plan, and possibly reviewed by the same Board staff, since they address closely related subjects.

B. Plans Addressing Both Fixed Facility Capacity and Rolling Stock Capacity Should Be Required

In order to minimize the types of difficulties encountered in recent major rail mergers, the Board actively should review the effect of a proposed combination on the capacity of the combined system and on the applicants' plans for capital improvement. Applicants should be required to file Capacity Plans for fixed facilities and rolling stock containing, among other things:

- An analysis of capacity of the combined system (*i.e.*, the ability of the system to accommodate train movements and the presence of stationary rolling stock).
- An analysis of the capacity needed to effect the proposed Operating Plan and the capital budget and schedule for providing any necessary additional capacity.
- Proposed capital improvements, including double (or triple) tracking and/or increased sidings, and new yards, terminals and other facilities.
- An analysis of the capability of the combined system (*i.e.*, the ability of the system to move rolling stock) as measured by objective standards, such as dwell time and/or average velocity.

The Capacity Plans should be coordinated with the Integration Plan to ensure that there will be adequate facilities to accommodate shifting traffic patterns throughout the various phases of the integration. The Capacity Plans would cover a period of

three years or longer, depending on the time needed to acquire or construct the capital projects associated with the integration. Again, extensive consultation between the applicants and the Board's staff and consultants will supplement the conventional litigation-style procedure.

A Rolling Stock Supply Plan, addressing both service issues and the proper level and deployment of rolling stock capital assets, should also be required. The Rolling Stock Supply Plan should also be coordinated with the Integration Plan to ensure that the rolling stock will be adequate to accommodate shifting traffic patterns throughout the various phases of the integration. This Plan also should be the subject of examination by a special section within the Board's staff, assisted by consultants, and an ongoing dialogue with the applicants, in addition to the normal administrative procedures.

In order to maintain managerial flexibility, and to adapt to changing conditions in the market and otherwise, deviation from the plans would be permitted, but explanatory reports would be made as to such deviations in the post-effective-date monitoring process.

Suggested regulations to implement these requirements of additional plans are presented in Appendix E.

C. The Board Should Not Attempt to Involve Itself in the Adjustment of Freight Claims

The suggestion that the Board should address the risk of merger-related service disruptions by imposing a system of pecuniary awards to shippers is misguided. Shippers, as discussed above, must be confident that operational integration will be effected in a manner designed to minimize service disruption and achieve maximum overall service enhancement. To this end, a field mediation system appropriately may be made available to small shippers. Public regional shipper meetings during implementation similarly might also benefit carriers, shippers, and the Board. However, the overall adjustment of such claims is best left to established mechanisms.

The mechanisms currently available, are established and workable. Courts of general jurisdiction, the railroads' tariffs, railroad transportation contracts ("RTC's") that prescribe the level at which any payment may be made to shippers, and commercial insurance currently are employed to resolve these claims. It is unlikely that the Board, acting in an entirely new role outside its traditional field of expertise, significantly would improve dispute resolution in this area.

More importantly, while the Board does not possess unique expertise in adjusting freight claims, it can play a critical role in ensuring that rail mergers proceed smoothly as possible – a role that no other entity has the jurisdiction or the expertise to fill. By acting as a freight claims adjuster, the Board would divert its

attention and resources away from its primary task of ensuring that combinations do not cause unnecessary service disruptions, which in turn lead to expensive and disruptive disputes. Indeed, the harm to the public interest that can arise from rail service disruptions is not limited to direct damage to shippers; it can include damage to other railroads in the interdependent North American rail network, the waste of fuel and other environmental impacts resulting from the diversion of rail traffic to trucks, disruption to firms doing business with the affected shippers, and lost wages for workers in the affected industries. The Board can best protect the broader public interest by ensuring that rail mergers do not cause unnecessary service disruptions in the first place.

CSX submits that the Board should expand its traditional focus on avoiding service problems or correcting them, without taking on the additional burden of making awards to shippers after problems have manifested themselves. If the parties to a proposed merger fail to demonstrate clearly that it can be implemented without unreasonable disruptions that would negate much of the public interest justification for the transaction, the Board should deny their application. The Board should closely monitor implementation and address problems through consultation with the parties and, if necessary, by issuing Service Orders. Indeed, by additional tools and procedures that CSX has proposed above, the Board can better fulfill these crucial obligations.

For small shippers with less access to traditional dispute resolution mechanisms for resolving service failures, the Board should consider establishing a system of non-binding mediation services, provided by a panel of outside mediators. Participation in the mediation would be optional on the part of the shipper but compulsory on the part of the carriers. Such a device could facilitate resolution of merger-related service concerns of small shippers by affording a basis for an equitable resolution in appropriate commercial terms without subjecting small shippers to the expenses of litigation. The Board's staff, moreover, could be assigned a monitoring role with respect to the mediations, thus providing the Board with another source of information on implementation issues.

An escape provision should be provided for shippers having RTC's, permitting them to terminate, at their request, their RTC's where service problems have been material and long continuing.

We suggest an implementing regulation in Appendix C.

III. THE BOARD SHOULD SUPPORT PRESERVATION OF THE ESTABLISHED PRINCIPAL TRANSCONTINENTAL GATEWAYS WHILE MAINTAINING ITS CURRENT APPROACH TO THE ANALYSIS OF THE COMPETITIVE EFFECTS OF MERGERS

The Board's current policies have been largely effective in maintaining competition without unduly restricting otherwise efficient combinations. The service disruptions that have arisen recently from major rail mergers have been caused by operational difficulties associated with the process of integration –

which CSX proposes that the Board address through detailed integration planning and close monitoring by and consultation with the Board. The use of alliances and joint arrangements in advance of ultimate consolidation may facilitate operational integration. Nonetheless, because these temporary integration problems are not competitive effects, there is no reason for the Board to deviate from its longstanding and rational approach to analyzing the competitive effects of proposed rail combinations.

The Board correctly is intolerant of unremedied two-to-one situations. As for three-to-two situations, the Board should continue in its discriminating, case-by-case approach, without a general rule either prohibiting or permitting them. The Board's current application of the "one lump" rebuttable presumption is based on sound economic theory and should not be abandoned.

While, under these principles, some combinations of Class I rail carriers will be prohibited, other primarily end-to-end combinations that offer significant efficiencies without an unacceptable loss of competition may be allowed. The Board should impose appropriate conditions to remedy any competitive problems resulting from any such proposed merger – including its impact on access to established traditional major gateways – but should not risk discouraging beneficial mergers by insisting on competition "enhancing" conditions to address problems not caused by the proposed transaction. Of course, the Board's policies should continue to encourage parties to identify acceptable competition-enhancing opportunities in

connection with mergers. As the Board observed in its March 31, 2000 Decision, the applicants in the CSX/NS/Conrail transaction themselves offered competition-enhancing elements in that transaction.

While rail competition needs thus to be preserved, combinations of Class I railroads should not be the occasion for destabilizing the economics of railroading or undoing the successful reform of railroad regulation in the past few decades that came principally from the Staggers Act. That story is well told in the Comments of the AAR being filed today, and we need not repeat its treatment here. The need of the railroad industry is for the railroads to be able to recapitalize themselves and to add to capacity and embrace technological advances. A governmental transfer of resources from the rail industry to the shippers has no place in such a scenario. So, rail combinations should not, through the conditioning power or otherwise, be occasions for changing the balance between private property ownership with its incentives for capital investment and the limited regulation evidenced in the Staggers Act. The development and application of the Board's existing regulatory tools, under existing law, should go forward on a case-by-case basis without regard to rail combinations. Thus, CSX does not support any of the proposals for changing the ground rules concerning the so-called "bottleneck" case and the "one lump" theory, as listed in the Board's March 31, 2000 Decision launching this proceeding. The opening of new switching, the termination of switching, and the reduc-

tion of switching rates should be left to private negotiation, and to the enforcement of the Board's existing powers, as in a non-combination setting.

Having said that, CSX does believe that end-to-end transcontinental combinations, as well as Class I North-South combinations,[4] involve possible loss of competition at the traditional major transcontinental East-West gateways (along the Mississippi River and at Chicago) and at major North-South gateways which will require regulatory intervention. The issue here may transcend economic theories of pricing and involve the availability of an alternative service route. That regulatory intervention cannot be like the discredited "DT&I" conditions, applying to all interchange points and without time limit, or creating rigidity of pricing and service (thereby becoming essentially anticompetitive),[5] and must provide suitable long hauls to both the originating and terminating carriers. CSX will develop these principles further after reviewing the proposals of others in this regard, and may offer the text of a suggested regulation.

IV. THE BOARD SHOULD REQUIRE THAT MERGER APPLICATIONS INCLUDE INFORMATION REGARDING CROSS-BORDER ISSUES

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[4] Consolidations involving the major U.S. carriers with either of the two major Canadian carriers would, by definition and in fact, be transcontinental transactions but they would also involve the traditional North-South gateways between the Canadian carriers and the U.S.-based carriers.

[5] The ICC's "commercial closing" doctrine relating to the DT&I conditions in essence prevented the single-line carrier from competing price-wise for the portion of the movement that each of the two carriers could handle.

The Board's rules for major rail mergers must accommodate the possibility of a cross-border combination involving either of the two major Canadian railroads, each of which is incorporated under the laws of Canada or its provinces and each of which is among the six largest railroads in North America. The Board correctly has recognized the important role that Canada would play in the proposal already made, as well as in other proposals that may be made in the future. Canada's laws, regulations, and its national interests (and those of Mexico) may differ from those of the United States. The differences may have important practical implications to the operation of a cross-border combination.

To ensure that potential cross-border issues are appropriately and adequately considered in the merger review process, applications involving a United States carrier and a non-United States-based carrier should be required to address certain specified issues. Those issues, moreover, also could be the subject of evidentiary submissions. Each such application should include:

- A description of the activities and plans of the combined railroads, both before and after the transaction, in the same breadth and depth as if they were all conducted within the United States, including the information required by the Integration Plan, Capacity Plans, and Rolling Stock Supply Plan described above.
- A description of the regulatory, legal or customary railroad restrictions in another country pertinent to the subjects treated in the application and to the transaction and the operation of the combined system and the impacts that these will have on operations in the United States.

- A statement as to whether all necessary foreign country approvals for the transaction have been received and, if not, how the Board can make the findings necessary to approve the transaction before the terms of such approvals are known.
- A discussion of car supply and the principles that would be applied if another country's regulatory requirements with respect to car supply were to conflict with contractual or regulatory car supply requirements applicable to shippers in the United States.
- A description of other potential conflicts between the two regulatory systems and the manner in which the applicants propose to resolve any such conflicts.
- A description of any legal requirements of any foreign country or authority, or any agreement involved in the transaction, concerning the nationality or residence of the persons who may be directors officers or employees of the combined entity, or of any entity controlling the combined entity.
- A description of any legal requirements of any foreign country or authority relating to the potential environmental impacts of the transaction.

This approach represents a departure from the Board's procedure in past combinations (through the CN/IC case in 1999), in which the applicants were permitted to determine the information to be provided regarding foreign activities of the combined entity that would, in the applicants' judgment, have impacts in the United States. In light of the significance of the large Canadian carriers, the competition between Canadian and U.S. ports (both Atlantic and Pacific), and the increasing economic unification of the NAFTA countries, the Board should make its own assessment of those impacts. A suggested regulation is proposed in Appendix D.

Future mergers involving non-U.S.-based carriers raise for the first time the potential for significant environmental impacts outside the United States as a result of Board action. This potential requires the Board to determine the scope of its environmental obligations under Executive Order No. 12114, entitled "Environmental Effects Abroad of Major Federal Actions" (1979),[6] and under the National Environmental Policy Act, 42 U.S.C. § 4321 *et seq.* ("NEPA"). It can only do so if it has complete information about proposed operational changes, and their potential for environmental impacts, both domestic and foreign. CSX does not propose that an applicant necessarily be required, with respect to foreign lines, to submit to the Section of Environmental Analysis ("SEA") the same information that SEA has required with respect to domestic lines (such as detailed information on the grade crossing warning systems at highway/rail at-grade crossings where rail traffic increases are projected). Rather, the scope of the information to be required for foreign environmental analysis should be determined by SEA on a case-by-case basis, taking into account the operational changes projected in the complete system Operating Plan and the required description of the country's regulations applicable to potential environmental impacts.[7]

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[6] 44 Fed. Reg. 1957 (1979), reprinted at 42 U.S.C.A. § 4321.

[7] It appears that prior rail combinations presented to the Board had very little potential for significant environmental impacts outside the United States. With respect to the CSX/NS acquisition of Conrail, Finance Docket No. 33388, both the CSX and NS Operating Plans presented information about all rail line segments, whether located in the United States or Canada. The CSX Operating Plan did not project a significant change in traffic or any other

Footnote continued on next page

V. THE BOARD SHOULD NOT, IN CONNECTION WITH A CLASS I MERGER, DISTURB THE TERMS OF THE TRANSACTIONS THAT CREATED THE SHORTLINES

Shortlines play an important role in providing continued service to shippers on lines that might otherwise be abandoned. The Board's policies with respect to major Class I transactions should not disturb the private transactions that created these shortlines.

Many of the country's shortlines are spin-offs from larger railroads, and the prices paid by the purchasers invariably reflect the value of the entire bundle of rights and restrictions that accompany the assets transferred. It would be contrary to sound public policy for the Board, in connection with a subsequent combination involving the transferor, to diminish or expand any of the restrictions placed on the marketing or operations of a shortline as part of the bargain that created it. Otherwise, uncertainty whether such bargains will be honored likely will discourage the formation of shortlines in the future. A condition preventing the enlargement of the "paper barriers" was appropriately included in the CSX/NS/Conrail decision,

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Footnote continued from previous page
significant operational change with respect to the Conrail line to Montreal, nor did the NS Operating Plan project any significant operational changes with respect to the exercise of its trackage rights in Ontario. With respect to the CN/IC control proceeding, Finance Docket No. 33556, the Operating Plan submitted to the Board did not expressly reveal the operational changes projected for the Canadian lines, but it was perhaps not unreasonable for the Board to infer, based on what was revealed about the merger, that there would not be significant operational changes in Canada. The same cannot confidently be said of future rail combinations involving Canadian carriers. Thus, the issue of foreign environmental effects was not squarely presented to the Board in prior control proceedings, and the Board should not be deterred from now addressing the issue merely because it did not consider them in prior control proceedings.

and there should be no occasion in any future merger transaction to cause a release or alteration of the geographic coverage of any such agreement.

As regards car supply and other operational matters, merger applicants should be required to confer with each of their shortline connections during the period between the filing of the Notice of Intent and the filing of the Application.

Suggested regulations are presented in Appendices C and F.

VI. THE BOARD SHOULD NOT DISTURB THE *NEW YORK DOCK* PROCEDURES REGARDING MODIFICATIONS TO COLLECTIVE BARGAINING AGREEMENTS OR THE PROTECTIONS AFFORDED ADVERSELY AFFECTED EMPLOYEES

In order to allow carriers to consolidate the employees and operations of different railroads – thereby realizing the efficiencies arising from approved transactions – the Board should retain its *New York Dock* procedures regarding modifications to collective bargaining agreements where necessary. For the same reason, the Board should not modify the already generous protections afforded employees who are adversely affected by mergers.

A. The Board Should Retain Its *New York Dock* Procedures Regarding Post-Merger Modifications To Collective Bargaining Agreements

The *New York Dock* procedures for modifying collective bargaining agreements are a fair and necessary means to achieve the public interest benefits of approved transactions. If the efficiencies associated with consolidation are to be

realized, employees must be placed on a common seniority roster under a common set of work rules. Under the *New York Dock* conditions, the carriers and unions are encouraged to achieve this by reaching voluntary implementing agreements, which they do in a substantial majority of cases. If the parties cannot agree, arbitration before a neutral arbitrator is available, followed by appeal to the Board and to the courts.

Absent these reasonable procedures, the virtually endless process for resolving disputes under the Railway Labor Act ("RLA") would "so delay the proposed transfer of operations that any efficiencies the carriers sought would be defeated." *Norfolk & Western Ry. Co. v. American Train Dispatchers Ass'n*, 499 U.S. 117, 133 (1991). In the CSX/NS/Conrail transaction, for example, implementing agreements between the three carriers and the thirteen or so unions representing their employees had to be reached. Those implementing agreements were reached through negotiations with the vast majority of the unions, with only a few implementing agreements being arbitrated. Under the RLA, by contrast, the carriers would have been required to serve over a hundred Section 6 notices and to engage in conferences and mediations of unlimited duration, all subject to the threat of strike if the negotiations failed, and without any means of insuring that implementing agreement were ever reached.

Thus, the Supreme Court recognized that, under 49 U.S.C. § 11321(a), the Board's approval carried with it the statutory power to exempt approved trans-

actions from the requirements of the RLA and RLA agreements. *Norfolk & Western*, 499 U.S. at 132. The Board itself has since repeatedly acknowledged the statutory mandate that its approval of consolidations supercedes dispute resolution procedures under the RLA, including the right to strike. *See CSX Corp. – Control – Chessie System, Inc. and Seaboard Coast Line Industries, Inc.*, (*Arbitration Review*), Finance Docket No. 28905 (Sub-No. 27) at 12 (served Dec. 7, 1995), *aff'd, United Transportation Union v. STB*, 108 F.3d 1425 (D.C. Cir. 1997) ("It is well settled that we have the authority to modify collective bargaining agreements when modification is necessary to obtain the benefits of a transaction that we have approved in the public interest"); *CSX Corp. – Control – Chessie System, Inc. and Seaboard Coast Line Industries, Inc. (Arbitration Review)*, Finance Docket No. 28905 (Sub-No. 22) at 13 (served Sept. 25, 1998); *Union Pacific Corp., et al.—Control and Merger—Southern Pacific Transportation Co., et al.*, Finance Docket No. 32760 (Sub-No. 22) at 4 (served June 26, 1997).

Accordingly, the *New York Dock* procedures relating to the post-merger modification of collective bargaining agreements serve the public interest and should not be abandoned.

B. The Board Should Not Disturb the Already Generous Protections Afforded Employees Who Are Adversely Affected by Mergers

There is no basis for the Board to extend its *New York Dock* protections for employees who are adversely affected by mergers, including the virtually unparalleled guarantee of wages and benefits for up to six years. The Board, the ICC and the courts have consistently upheld the *New York Dock* protections as appropriate and adequate. *See New York Dock Ry. v. United States*, 609 F.2d 83, 91 (2d Cir. 1978); *Union Pacific Corp., et al. – Control and Merger – Southern Pacific Corp., et al.*, Finance Docket No. 32760 at 172 (served Aug. 12, 1996) (Dec. No. 44); *CSX Corp. – Contro – Chessie System, Inc., and Seaboard Coast Line Industries, Inc.*, 363 I.C.C. 521 (1980) ("*CSX Control*"); Norfolk *Southern Corp. – Control – Norfolk and Western Ry. Co. and So. Ry. Co.*, 366 I.C.C. 173, 230 (1982).

Indeed, the current protections are already a significant burden on the competitiveness of railroads. Between 1992 and 1996, for example, CSX paid $45 million in *New York Dock* protective payments. Trucks and other modes with which railroads compete are not saddled with comparable costs.

Increasing the protective period to 10 years would increase employee protection costs by as much as 40 percent, further reducing the pool of funds available for necessary capital projects or other improvements in service. *See CSX Control*, 363 I.C.C. at 590 ("An expansion of employee protection imposes further restrictions on a carrier's ability to use its employees productively"); *Rio Grande*

Industries Inc., et al. – Control – Southern Pacific Transportation Co., 4 I.C.C. 2d 834, 954 (1988) (imposing enhanced benefits similar to those sought in *CSX Control* would "unduly restrict a carrier's ability to establish economical operations and use its employees productively"). An extension of the already generous benefits paid to affected employees would therefore be contrary to the public interest.

VII. POLICY STATEMENT AND OTHER REVISIONS TO THE BOARD'S REGULATIONS

The positions taken by CSX above reflect policies which are to a considerable extent different from those currently stated in the Board's Statement of Policy, which CSX and other parties at the public hearings recognized to be out of date. Consistent with the views expressed by CSX herein, a new Policy Statement is suggested in Appendix H.[8]

The Board's regulations are out of date in some other less critical areas, in that they might be criticized for devoting considerable attention to topics that were important in the late 1970's and the early 1980's, but which are of less importance today. On the other hand, many topics which were not important then are of importance now. We have tried to deal with the latter category in the present Comments and in the suggested regulation changes set forth in the Appendices, but

[8] Other Appendices contain certain procedural suggestions, including in Appendix B, an amendment confirming the Board's powers to summarily dismiss an application.

we have not thought it appropriate to undertake the task of drafting an entire new set of regulations, which indeed might have been presumptuous. We do, however, respectfully suggest that the Board review other aspects of 49 C.F.R. Part 1180, Subpart A, to see if other revisions, not within the scope of these comments, might be appropriate to be included when the Notice of Proposed Rulemaking is issued.

CONCLUSION

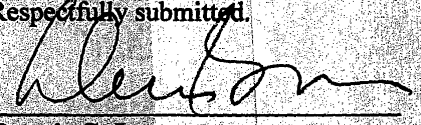
CSX believes that, in due course, certain transcontinental combinations, properly designed, conditioned and executed, could be promotive of the public interest and be of advantage to shippers. The major public benefit that can come from further combinations should be the extension of single-line service, universally viewed as beneficial to the shipping public. So combinations could be permissible where they offer the benefits of substantially expanded single-line service not otherwise practically available, unless the offsetting problems or the serious prospect of such problems overpower the benefits. Another benefit that can come from the right kind of transcontinental combination is cost reduction – not that which comes primarily at the expense of jobs of employees in the operating crafts, but that which comes from the reduction of duplicative overhead employees, generally at the management level. In CSX's view that is not as compelling a benefit as expanded single-line service but its potential for savings that may be applied to recapitalizing the carriers can make it a benefit that can be taken into account.

Balanced against those benefits must be the possibilities of harm to the public interest from rail combinations. The Board and its predecessor over the years became less and less tolerant of the elimination of rail-to-rail competition in combination transactions, and clearly absent compelling reasons there should be no reversal of that trend. Accordingly, the risk of the disruptions and the damage to rail service that have commonly followed in the wake of recent railroad combinations, is, CSX believes, realistically the principal adverse factor that the Board would have to consider in connection with any transcontinental combination that might be proposed, once the industry has restored itself to health following the implementation difficulties of recent transactions.

Once it is appreciated that it is unlikely that any major consolidations would be approved for the primary purpose of reducing excess capacity and eliminating duplicative facilities, but would be approved only if primarily for the purpose of providing expanded, efficient single-line service, it seems to us that the practical focus of examination by the Board must shift. The Board should be more careful in its examination of combinations to see if the claimed benefits could be obtained in all or in material part by alternative means short of consolidation, such as marketing alliances, run-through trains, pre-blocking, integration of certain facilities or functions, or the like. The Board must also take steps, such as those outlined herein, looking toward assuring a successful integration of the combining carriers

in a manner which avoids significant disruption and in which the carriers will have sufficient capacity to deliver improved service.

Respectfully submitted,



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May 16, 2000

APPENDIX A

[Definition of "transcontinental transaction" to go at end of § 1180.2]

(__) A transcontinental transaction is a transaction that (i) is within the provisions of 49 U.S.C. § 11323(a) (and which is not an exempt transaction), (ii) involves two or more entities or systems that are either (a) Class I rail carriers or (b) a rail carrier or system of rail carriers under common control which if located entirely within the United States would be a Class I rail carrier individually or on the basis of the system being considered a single-rail carrier, and (iii) would create or augment a system of rail carriers serving both the East and West coasts of the North American continent (including as coasts major inland water accesses to the Atlantic and Pacific Oceans, such as Chesapeake Bay, San Francisco Bay, and the St. Lawrence River).

APPENDIX B

[Redesignate present § 1180.4(c)(8) as § 1180.4(c)(8)(i) and add the following confirmatory regulation as § 1180.4(c)(8)(ii) and (iii)]

(ii) The application must present a *prima facie* case for the transaction at the time of and under the circumstances prevailing when the application is filed. If the Board on its own motion or upon petition by an interested party finds that due to temporary conditions in the industry or other similar factors, it would not be consistent with the public interest for the transaction to be considered or approved at the present time, the Board may serve a decision dismissing the application without prejudice to its later resubmission. The Board's decision shall explain specifically why the application is being dismissed.

(iii) Actions taken under this subsection (8) may be taken at any time following the receipt of the application.

APPENDIX C

[The following might be placed in a new § 1180.5 to be entitled "Additional Provisions in Transcontinental Transactions"]

(___) Every applicant in a transcontinental transaction shall be deemed to have consented to the imposition of the conditions set forth below in the case of the approval of the transaction, and such other conditions as the Board may impose:

(1) If a shipper having a contract made prior to the effective date of the Board's authorization of the transaction with any or all of the applicants for rail transportation (an "RTC"), which upon the implementation of the transaction is to be performed by the consolidated company or companies, is dissatisfied with the service it receives subsequent to the implementation of the transaction, the shipper may at any time after six months from the effective date of the Board's decision approving the transaction submit the issues to expedited binding arbitration under an arbitration protocol to be agreed to by the parties or to be imposed by the Board, with such arbitration to be concluded within 60 days from the date the arbitrator is selected. Before such submission, the shipper shall give written notice to the applicants as to claimed operating or other deficiencies below the level at which they were provided prior to such effective date, and an opportunity of 30 days to improve performance and to cure those deficiencies going forward. In that arbitration, the sole issue shall be whether there is just cause because of such deficiency in performance to terminate the RTC. Such termination shall take place 30 days

after the arbitrator's award unless the award shall fix some other date. Except for such termination, such arbitration shall neither address nor affect in any way the rights, obligations or remedies of any party under the terms of such RTC; and the award in such arbitration shall not be deemed to establish any facts with respect to the performance of such RTC for any purpose other than such arbitration.

(2) At any time within the period commencing 6 months after the effective date of the Board's authorization of the transaction and ending 36 months after the effective date of the Board's authorization of the transaction, a shipper that has within the past 12 months transported cargo having a total freight billing of $_____, but not more than $_____, over the lines of the combined carriers (before or after the implementation of the combination), which is dissatisfied with service rendered by the combined carriers subsequent to the effective date, and who has complained of such dissatisfactory service to the carrier in writing at an address designated by the combined carriers, may request the appointment of a mediator from a panel of mediators established by the Board. The mediator shall meet with representatives of the parties either jointly or separately, receive submissions from them if appropriate, and use his or her best efforts to propose a resolution of the complaints of the shipper in a commercial manner that is mutually satisfactory. The carrier shall cooperate with such mediation, but neither party shall be under an obligation to make concessions or agree to any solution by reason of this

condition. Neither the carrier nor the shipper shall use any statement made or material submitted in connection with the mediation following the appointment of the mediator, in any subsequent proceeding, except to the extent that the parties may agree. The expenses of the mediation shall be paid by the carrier, but shall not exceed payment for more than 20 hours of the mediator's time, plus the reasonable expenses of the mediator. The parties may, but shall not be required to, convert the mediation into a binding arbitration under such rules as they may agree upon, and the costs and expenses of such arbitration shall be apportioned as the parties shall provide in their submission to arbitration. Except in the case of a submission to arbitration, neither the mediation nor the failure of the shipper to seek mediation shall affect the rights, obligations or defenses of any of the parties, except to the extent that express provision is made therefor in connection with a written settlement agreement entered into as a result of the mediation or otherwise.

(3) With respect to any shortline carrier that operates upon lines formerly operated by the applicants or their predecessors, and that, in connection with such operations, is subject to a contractual provision that limits the circumstances under which the shortline may interchange traffic with a nonapplicant, or which imposes a separate charge for such interchange ("Blocking Provision"), the applicants may not enforce any such agreement in any way that has the effect of providing that the reach of such Blocking Provision is expanded as a result of the transaction.

Environmental Analysis, as appropriate, shall undertake environmental review of potentially significant environmental impacts outside the United States based on the proposed operations and activities of the applicants and any other information SEA may direct the applicants to provide.

(b) The application shall describe the railroad regulatory and other legal or customary restrictions, regulations and requirements in another country than the United States pertinent to the subjects treated in the application and pertinent to the transaction (including environmental impacts from the transaction) and the operation of the combined system, and the impacts that these restrictions, regulations or requirements will have on operations in the United States or on the United States regulatory system.

(c) The application shall discuss in particular issues of car supply and the principles that would be applied if the regulatory requirements of a country other than the United States with respect to car supply were to conflict with contractual or regulatory requirements for car supply with respect to shippers in the United States.

(d) The application shall describe the possibility of other conflicts between the regulatory systems of the United States and that of each other such country, and the way in which the applicants propose to resolve any conflicts between the regulatory systems.

collective private regulation authorized under the laws of the country or its governmental subdivisions.

APPENDIX E

[The following would be inserted as § 1180.8(c) at the end of present § 1180.8(b)]

(c) In a transcontinental transaction the following additional materials shall be furnished collectively as a separate volume of the application:

(i) An Integration Plan, describing in detail the method of integration of the carriers involved, the timetable for the integration, and the various functions to be integrated (including, without limitation, computer systems), shall be provided in the Application. The integration plan shall be harmonious with the operating plan. It shall address at least the following matters:

(A) Whether the integration of the systems of the applicants is to be effected on a single day or in a comparable short period of time or whether the process of integration would be effected in phases.

(B) If the transaction is to be implemented in phases, a description of the particulars to be integrated in each phase, and a proposed timetable for the various phases. State whether the phases involve different functions or involve different routes, or are dependent on the construction, development, acquisition or implementation of improvements to the Applicant's physical facilities, rolling stock, or information technology systems, or involve the rerouting of certain commodity movements in phases and others in other phases (such as

major coal movements, intermodal movements, new car movements, or the like). These matters should be discussed in detail.

(C) A statement of the internal controls as to the state of readiness, in detail, including the objective measurements, that the applicants will use in determining when a single-day implementation is ready to be performed, or when it is appropriate to commence and to move from one phase of a phased implementation to another.

(D) A list of the potential "choke points" which the applicants believe will be critical points in their systems during the integration. The Plan should identify why the potential choke points are viewed as such, how the applicants propose to increase capacity, if needed, at the choke points, and how they propose, through objective measurements, to monitor the choke points.

(E) The contingency plans that applicants propose to execute if congestion or other difficulties occur with respect to the choke points in question, the triggers for the deployment of the contingency plans, and the effects on their network and the networks of other rail carriers of the deployment.

(F) A critical path analysis showing the various preliminary steps that must be taken prior to a single-day implementation or to each phase of a phased integration, showing the interdependencies of the steps in the critical path.

(G) A discussion of the plans to continue the maintenance of service to shippers whose movements are confined to the limits of the preexisting separate networks of the applicants during the integration process. This discussion shall address the issue of potential neglect to such shippers if integration-specific problems arise.

(H) The plan for integrating the information systems of the applicants, discussing the major systems involved, the degree of compatibility between them, the steps that will be taken to cause the separate systems to interact prior to any combination into a single system, and the phasing of the integration, all in sufficient detail to permit an expert in the subject to make a detailed analysis of the plan for the integration of the systems.

(I) A discussion of the increments in which integration of the labor force of the applicants will be effected, the phases at which the transfers, hires, reductions and other steps taken with respect to employees will occur, and the phases with which these changes will be associated.

(J) The Integration Plan should be cross-referenced, in detail with the capacity plans and the rolling stock supply plan described in subsections (ii) and (iii).

The Integration Plan should build upon the Operating Plan, but the Operating Plan is to be updated in this connection. As set forth in § 1180.8(a), the

Operating Plan is presented reflecting the impacts revealed in the impact study. However, since the impact study is generally based on information which is somewhat out of date, the applicants should indicate the adjustment that they believe appropriate in order to bring the Operating Plan up to date so that it can be effectively used as a basis for a real-time Integration Plan.

The Board may appoint consultants at the expense of the applicants to assist the Board's staff in its review of the Integration Plan. A section of the Board's staff will be appointed to interact with the consultants in this regard and with respect to the similar plans referred to in subparagraphs (ii) and (iii).

(ii) Capacity Plans for fixed facilities and rolling stock, harmonious with the Operating Plan and expanding upon it. The plan shall contain an analysis of capacity (that is, the capacity of the system to accommodate train movements and stationary rolling stock) and capability (the ability of the system to move rolling stock) as measured by objective standards, such as dwell time and/or average velocity. In this regard, the Capacity Plan for fixed facilities shall analyze the operating capacity of the integrated system, in which the present capacity and capability of the lines of the applicants shall be presented in detail, including status as single track, double track, number of sidings, etc., and the capacity and capability required by the combination in the light of the train frequencies in the operating plan shall be presented in similar detail. Similar information shall be

provided as to yards, terminals, intermodal facilities, and other potential points of congestion affecting rail movements or providing for handling or storage of rolling stock. In regard to the foregoing, there shall be a schedule of proposed capacity/capability-increasing capital expenditures, in detail, with an indication of the increase in capacity and capability and other benefits projected, a detailed budget for the projects, and the timeframes for such capital projects. A similar Capacity Plan for rolling stock shall be made with respect to fleet requirements of locomotives and freight cars and the proposed capital budget for them. The material concerning rolling stock required by § 1180.8(a)(3) shall be integrated with and submitted as part of the Capacity Plan for rolling stock contemplated hereby. The Board may appoint consultants at the expense of the applicants to assist the Board's staff in its review of these plans.

(iii) A Rolling Stock Supply Plan, addressing both locomotives and cars. The Supply Plan should be complementary to the rolling stock Capacity Plan. The Supply Plan for cars should also discuss principles for allocating cars in time of shortage. The Board may appoint consultants at the expense of the applicants to assist the Board's staff in its review of the plans.

APPENDIX F

[A further addition to § 1180.5]

(___) The application shall list all Class III carriers (and all rail carriers in Canada which are not transcontinental carriers) (collectively, "shortlines") with which the lines of any of the applicants directly connect, shall describe the principal lines of each such carrier, shall identify the points of connection between the applicants and each such shortline, and shall identify what, if any, other rail carriers connect with the lines of the shortlines and the points of connection. Applicants shall consult with each directly connecting shortline during the period subsequent to the Notice of Intent as to operational matters. After the filing of the application, Applicants shall provide each directly connecting shortline with a copy of the Operating Plan, Integration Plan, Capacity Plans and Rolling Stock Supply Plan and shall name one or more individuals as Applicants' contact person to address questions raised by such short lines regarding the Plans.

APPENDIX G

[A further regulation for § 1180.5]

(__) In a transcontinental transaction the application shall discuss the impact on themselves, other rail carriers and on competition among rail carriers, of any other transcontinental combinations of Class I carriers (or carriers which would be Class I carriers if all their operations were in the United States) that are proposed or that are reasonably likely to be proposed in response to the transaction. The applicants shall submit with the application a true copy of any formal or informal study made by the applicants, or commissioned by or for them, concerning possible transcontinental combinations, whether involving the applicants or other carriers, which were created at any time from and after the 120th day prior to the filing of the prefiling notification referred to in § 1180.4(b) concerning the proposed transaction to which the application relates with a statement under oath as to the completeness of such submission, or a statement under oath that no such study was created.

APPENDIX H

§ 1180.1 General policy statement for merger or control of at least two Class I railroads.

(a) *General.* The Surface Transportation Board encourages private industry initiative that leads to superior service to shippers. The Board is neither promotive nor discouraging of transcontinental and other major carrier rail mergers and consolidations as a matter of principle. The Board will only consider such mergers and consolidations as being consistent with the public interest if they produce substantial benefits (such as extended and efficient single-line service) to shippers and receivers of goods within the United States, which benefits are not overshadowed by detriments to such shippers and receivers, including loss or disruption of service or substantial reduction of transport alternatives, or by other detriments to the public interest. The Board's analysis of the competitive impacts of a merger or consolidation is especially critical in light of the Congressionally mandated commitment to give railroads substantial freedom to price without regulatory interference, and accordingly the Board looks with disfavor on unremedied reduction from two rail carriers to a single rail carrier of a shipper with a non-minimal use of rail service and will carefully examine cases where service by three carriers is reduced to service by two carriers. The Board does not favor consolidations through the exercise of managerial and financial control if the controlling entity does not

assume full responsibility for carrying out the controlled carrier's common carrier obligation to provide adequate service upon reasonable demand, and, subject to the foregoing, the Board looks with favor on combinations which promote the efficient use of existing capital as well as promoting the raising and efficient use of further capital to make improvements fostering better service.

(b) *Consolidation criteria.* The Board's consideration of the merger or control of at least two class I railroads is governed by the non-exhaustive criteria prescribed in 49 U.S.C. § 11324 and by the rail transportation policy set forth in 49 U.S.C. § 10101.

(1) Section 11324 directs the Board to approve consolidations which are consistent with the public interest. In examining a proposed transaction, the Board must consider, at a minimum:

(i) The effect on the adequacy of transportation to the public;

(ii) The effect of including, or failing to include, other rail carriers in the area involved in the proposed transaction;

(iii) The total fixed charges that would result;

(iv) The interest of affected carrier employees; and

(v) The effect on competition among rail carriers in the affected region or in the national rail system.

(2) The Board must also consider the impact of any transaction on the quality of the human environment and the conservation of energy resources.

(c) *Public interest considerations.* In determining whether a transcontinental or other major rail combination is in the public interest, the Board performs a balancing test. It weighs the potential benefits to shippers and receivers in the United States and the public generally against the potential harm to those shippers and receivers and the public. The Board will consider whether the benefits claimed by applicants could be realized by means other than the proposed consolidation that would result in less potential harm to the public.

(1) *Potential benefits.* Without exhausting the category of matters that are within the category of public benefits from a transcontinental or other major merger or consolidation, the Board looks to improved service to shippers and receivers in the United States, particularly (though not exclusively) through increased single-line service. Consolidations generally are the only feasible way for rail carriers to enter many new markets and provide single-line service to and from them other than by contractual arrangement, such as for joint use of rail facilities or run-through trains. This beneficial result can occur if the consolidated carriers are able to realize savings and improve their ability to raise capital and increase their capacity to furnish service to the public.

(2) *Potential harm.* There are three major potential results from consolidations that would ill serve the public — reduction of competition, disruption of service, and harm to essential services. In analyzing these impacts, we must consider, but are not limited by, the policies embodied in antitrust laws.

(i) *Reduction of competition.* If two carriers serving the same market consolidate, the result would be the elimination of such competition as exists between the two. Even if the consolidating carriers do not serve the same market, there may be a lessening of potential competition in other markets. While the reduction in the number of competitors serving a market is not in itself harmful, a material lessening of competition resulting from the elimination of a competitor is a detriment to the public interest. The Board recognizes that rail carriers face not only intramodal competition, but also intermodal competition from motor and water carriers, and the Board's analysis will reflect that to the extent pertinent.

(ii) *Disruption of Service.* Recent major rail combinations have resulted in severe disruptions of service for protracted periods due to difficulties in implementation of the new or changed services provided for in the transaction. Such disruptions are clearly contrary to the public interest. The Board will carefully consider the ability and plans of the combining carriers to effect the transaction, and the failure to make a satisfactory demonstration of such ability and plans, which suggests that a substantial possibility that serious service disruptions, even

temporary, will result, will be considered as grounds for denying the application. Since the Board's goal is the furtherance of efficient services to the shipping public, provisions for the payment of indemnities upon service failures to shippers will not be considered as an ameliorating matter in such a case, since such service failures, whether or not compensation is paid to shippers, divert traffic that should be carried by rail to the highways, waste energy, increase pollution, and, in view of the fact that the entire North American rail system is interdependent, cause disruptions beyond the lines of the carriers involved in the combination, with further damage to the public interest. The Board may attach conditions to transactions approved by it designed to further the smooth integration of the combining carriers without disruptions. *See* paragraph (d) below.

(iii) *Harm to essential service.* Consolidations often result in shifts of market patterns. Sometimes the carrier losing its share of the market may not be able to withstand the loss of traffic. In assessing the probable impacts, the Board's concern is the preservation of essential services, not the survival of particular carriers. A service is essential if there is a sufficient public need for the service and adequate alternative transportation is not available.

(d) *Conditions.* The Board has broad authority to impose conditions on consolidations, including those that might be useful in ameliorating potential anti-competitive effects of a consolidation, safeguarding against service disruptions, or

providing for the continuation of essential services. However, the Board recognizes that conditions may lessen the benefits of a consolidation to both the carrier and the public. Therefore, in general, the Board will not impose conditions (unless requested by the applicants) substantially recasting the substance of the proposed transaction (but will deny the application if without such restructuring it would not be consistent with the public interest). In the case of asserted need to protect the availability of essential services, the Board will not normally impose conditions on a transaction to protect a carrier unless essential services are affected and the condition: (i) is shown to be related to the impact of the consolidation; (ii) is designed to enable shippers to receive adequate service; (iii) would not pose unreasonable operating or other problems for the consolidated carrier; and (iv) would not frustrate the ability of the consolidated carrier to obtain the anticipated public benefits. Moreover, the Board believes that indemnification is ordinarily not an appropriate remedy in those situations. Indemnification conditions are anticompetitive by requiring the consolidated carrier to subsidize carriers that are no longer able to compete efficiently in the marketplace.

(e) *Inclusion of other carriers.* The Board will consider requiring inclusion of another carrier as a condition to approval only where there is no other reasonable alternative for providing essential services, the facilities fit operationally into the

new system, and inclusion can be accomplished without endangering the operational or financial success of the new company.

(f) *Labor protection.* The Board is required to provide applicants' employees affected by a consolidation with adequate protection. Similarly situated employees on the applicants' system should be given equal protection. Therefore, absent a negotiated agreement, the Board will provide for protection at the level mandated by law (49 U.S.C. § 11326), unless it can be shown that because of unusual circumstances more stringent protection is necessary to provide employees with a fair and equitable arrangement. The Board will review negotiated agreements to assure fair and equitable treatment of affected employees.

(g) *Consolidation, cumulative impacts and crossover effects.* The Board will to the fullest extent possible consolidate for joint development and consideration any two or more applications for transcontinental combinations (or of other major combinations with a transcontinental combination). The Board will in any case involving a transcontinental transaction consider the impact of potential or reasonable hypothetical combinations or transactions on the consolidation or consolidations under consideration, and *vice versa*. *See* § 1180.___(___). Appropriate conditions may be attached to orders approving transactions in this regard.

(h) *Public participation.* To assure a fully developed record on the impacts of a proposed railroad consolidation, the Board encourages public participation from

Federal, State, and local government departments and agencies, affected shippers and carriers, and other interested persons.

[47 FR 9844, Mar. 8, 1982, as amended at 47 FR 11876, Mar. 19, 1982. Redesignated at 47 FR 49592, Nov. 1, 1982, as amended at 62 FR 9716, Mar. 4, 1997. Further amended, ___ FR ___, ___, 2001.]

BEFORE THE

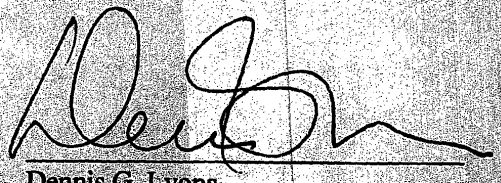
SURFACE TRANSPORTATION BOARD

STB Ex Parte No. 582 (Sub-No. 1)

MAJOR RAIL CONSOLIDATION PROCEDURES

CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of May, 2000, a copy of the foregoing Comments Of CSX Corporation and CSX Transportation, Inc. was served by first class mail, postage prepaid, or more expeditious manner of delivery, on all Parties of Record in Ex Parte No. 582 (Sub-No. 1), as per the attached service list.



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